Supreme Court, U.S.
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In The

Supreme Court of the United States

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOANALYSIS, CEDRUS MONTE, ALLAN D. SOWERS, and LIONEL CORBETT,

Petitioners,

v.

CALIFORNIA BOARD OF PSYCHOLOGY'S EXECUTIVE OFFICER THOMAS O'CONNER and BOARD MEMBERS MARTIN GREENBERG, et al., and BILL LOCKYER, CALIFORNIA STATE ATTORNEY GENERAL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER,
Attorney General of the State of California

CARLOS RAMIREZ
Senior Assistant Attorney General

VIVIEN HARA HERSH
Supervising Deputy Attorney General

KERRY WEISEL
Deputy Attorney General
Counsel of Record
1515 Clay Street, 20th Floor
Oakland, CA 94612-1413
Telephone: (510) 622-2145
Fax: (510) 622-2270

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether California's mental health licensing scheme passes First Amendment scrutiny when, as the Court of Appeals ruled, "[i]t is properly within the state's police power to regulate and license professions," "given the health and safety implications, California's interest in regulating mental health is even more compelling than a state's interest in regulating in-person solicitation by attorneys," and "the licensing scheme is rationally related to California's interest in protecting the mental health and safety of its citizens."

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STATEMENT OF THE CASE

Petitioners' statement of the case contains many assertions which are extraneous to the issues presented and omits relevant facts. In its published opinion, the Court of Appeals for the Ninth Circuit provided an accurate and complete explanation of the factual and procedural background of the case. (Appendix A to the Petition ("App. A") at 3a through 9a.) Respondents adopt that explanation as their statement of the case and incorporate it here by reference.

REASONS FOR DENYING THE WRIT

THE NINTH CIRCUIT'S DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S PRIOR DECISIONS

A. Laws and Regulations Governing Professions are Properly Reviewed Using the Rational Relationship Test

The Ninth Circuit concluded that California's psychology licensing laws are rationally related to the state's legitimate interest in safeguarding the mental health of its citizens and do not infringe upon petitioners' right to free speech. This decision is in no way unique or remarkable. It is wholly consistent with a long line of Supreme Court decisions going back at least as far as 1889. (*Dent* v. *West Virginia,* 129 U.S. 114 (1889).) This Court has repeatedly held "the States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other

valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." (*Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975) (lawyers); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (pharmacists); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955) (ophthalmologists, optometrists, opticians); *Graves* v. *Minnesota*, 272 U.S. 425, 427-28 (1926) (dentists); *Douglas* v. *Noble*, 261 U.S. 165, 167, 169-70 (1923) (dentists); *Watson* v. *Maryland*, 218 U.S. 173, 176, 179-80 (1910) (doctors); *Dent*, 129 U.S. at 122 (doctors).) Such licensing schemes are subject only to rational basis review. (*Ibid.*)

The federal courts of appeals have followed this Court's lead, uniformly holding the licensing of professions to be within a state's police powers and properly reviewed using the rational basis test. (*Lange-Kessler* v. *Dept. of Educ. of State of N.Y.*, 109 F.3d 137, 140 (2d Cir. 1997) (midwives); *Sammon* v. *New Jersey Bd. Of Medical Examiners*, 66 F.3d 639, 645 (3d Cir. 1995) (midwives); *Mitchell* v. *Clayton*, 995 F.2d 772, 774 (7th Cir. 1993) (acupuncturists); *Maguire* v. *Thompson*, 957 F.2d 374, 377 (7th Cir.), *cert. denied*, 506 U.S. 822 (1992) (naturopaths); *Abramson* v. *Gonzalez*, 949 F.2d 1567, 1580 (11th Cir. 1992) (psychologists); *Giannini* v. *Real*, 911 F.2d 354, 358 (9th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990), *rehearing denied*, 498 U.S. 1116 (1991) (lawyers); *Accountant's Soc. Of Virginia* v. *Bowman*, 860 F.2d 602, 603-04 (4th Cir. 1988) (accountants); *Lucero* v. *Ogden*, 718 F.2d 355, 359 (10th Cir. 1983), *cert. denied*, 465 U.S. 1035 (1984) (lawyers).) Petitioners have cited no case and respondents know of none which holds otherwise.

B. California's Laws Governing the Practice of Psychology, Like Laws and Regulations Governing Other Professions, Are Properly Reviewed Using the Rational Relationship Test

There is no basis for distinguishing this case from the unbroken string of cases preceding it which hold that the licensing of professions is reviewed using the rational relationship test. Petitioners' claim that the practice of psychoanalysis is "pure speech" is unavailing. First, as the Ninth Circuit, and the District Court before it, noted, "the key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech. . . . That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection." (*NAAP* v. *California Bd. Of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000); App. A at 23a. Emphasis in original; interior quotation marks omitted.)

There is no doubt that the practice of psychoanalysis involves speech. So, too, does the practice of law. (*Legal Services Corporation* v. *Velazquez*, ___ U.S. ___, Nos. 99-603, 99-960, 2001 WL 193738 (February 28, 2001) recognizing that legal advice and argument constitute speech and that, therefore, it is a violation of the First Amendment right to free speech for Congress to prohibit legal services lawyers from challenging existing welfare law on behalf of their clients; *Paciulan* v. *George*, 229 F.3d 1226, 1230 (9th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 775 (2001).)

Nonetheless, this Court has consistently held that laws regulating admission to the legal profession are subject to rational basis review (*Ohralik* v. *Ohio State Bar*

Assn., 436 U.S. 447, 459 (1978); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 772, 792 (1975); *Konigsberg* v. *State Bar*, 366 U.S. 36, 49, 53 (1961); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239 (1957)) and the federal courts of appeals have followed suit (*Paciulan*, 229 F.3d at 1229, 1230; *Tolchin* v. *The Supreme Court of the State of New Jersey*, 111 F.3d 1099, 1114 (3d Cir.), *cert. denied*, 522 U.S. 977 (1977); *Scariano* v. *Justices of Supreme Court of Ind.*, 38 F.3d 920, 923 (7th Cir. 1994), *cert. denied*, 515 U.S. 1144 (1995); *Lawline* v. *American Bar Ass'n*, 956 F.2d 1378, 1385, 1386 (7th Cir. 1992) (holding that a licensing scheme governing lawyers is subject to rational basis review and that "[a]ny abridgment of the right to free speech is merely the incidental effect of observing an otherwise legitimate regulation"), *cert. denied*, 510 U.S. 992 (1993); *Giannini* v. *Real*, 911 F.2d at 358; *Goldfarb* v. *Supreme Court of Virginia*, 766 F.2d 859, 861 (4th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986); *Lupert* v. *California State Bar*, 761 F.2d 1325, 1328 (9th Cir. 1985); *Lucero* v. *Ogden*, 718 F.2d at 359; *Feldman* v. *State Board of Law Examiners*, 438 F.2d 699, 705 (8th Cir. 1971)).

Justice White, concurring in *Lowe* v. *S.E.C.*, 472 U.S. 181, 232 (1985), offered a useful method of distinguishing the regulation of a profession from the regulation of speech:

> "One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. . . . [T]he professional's speech is incidental to the conduct of the profession. If the government enacts generally applicable licensing provisions limiting the class of persons who

> may practice the profession, it cannot be said to have enacted a limitation on freedom of speech . . . subject to First Amendment scrutiny."

The key, then, to "distinguishing between occupational regulation and abridgement of first amendment liberties is in finding a personal nexus between professional and client." (*Bowman*, 860 F.2d at 604.) Such a personal nexus does exist between a psychoanalyst and his or her patient. No such nexus exists to justify a similar licensing scheme addressed to the regulation of professional musicians, poets, playwrights, and the other artistic professions with which petitioners attempt to identify themselves.

The Ninth Circuit's decision that California's psychology licensing laws do not infringe upon petitioners' right to free speech is supported by over a century of precedent. Doctors, dentists, accountants, and the many other professionals whose licensing laws have routinely been reviewed under the rational relationship test all give counsel and advice in the practice of their professions. All employ speech. The practice of law is almost exclusively speech. Yet, for licensing purposes, the effect on speech is considered incidental. Therefore, it is immaterial that the court below made a secondary finding that California's licensing scheme is content and viewpoint neutral. It does not matter because speech is not at issue. The finding is irrelevant and does not alter the correctness of the court's decision.

California's Psychology Licensing Law does not raise First Amendment concerns. It prohibits unlicensed persons from engaging in the practice of psychotherapy for a fee; it does not impose restrictions on their public speech.

Finding that the statutes and regulations at issue implicated neither a suspect classification nor a fundamental right and that the goal of protecting the public health and safety warranted California's system of licensing psychologists, the Ninth Circuit concluded that "the psychologist licensing scheme is rationally related to legitimate government interests." (*NAAP*, 228 F.3d at 1053; App. A at 20a.)

CONCLUSION

The decision of the Ninth Circuit is in complete conformity with the opinions of this Court on professional licensing and there is no conflict among the circuits on this issue. This case raises no question requiring this Court's attention. For these reasons, respondents respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

BILL LOCKYER,
Attorney General of the State of California
CARLOS RAMIREZ
Senior Assistant Attorney General
VIVIEN HARA HERSH
Supervising Deputy Attorney General
KERRY WEISEL*
Deputy Attorney General
**Counsel of Record*

Attorneys for Respondents